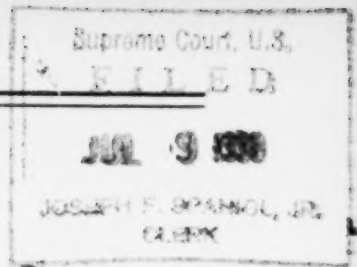


90-653 No. ①



IN THE
Supreme Court of the United States

October Term, 1990

JUDYBILL OSCEOLA, Enrolled Member of
the Seminole Indian Tribe of Florida,
et al., and all others similarly situated,

Petitioner,

against

FLORIDA DEPARTMENT OF REVENUE,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

Barbara L. Wolf
Attorney for Petitioner
Barbara L. Wolf, P.A.
2425 E. Commercial Blvd.
Suite 307
Ft. Lauderdale, Florida 33308
(305) 492-1111

13pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States District Court for the Southern District of Florida lack subject matter jurisdiction over this case pursuant to the Tax Injunction Act and the Eleventh Amendment to the United States Constitution, affirmed by the United States Court of Appeals for the Eleventh Circuit?

2. Can an individual enrolled member of a federally recognized Indian tribe assert federal court jurisdiction under the co-plaintiff doctrine to the federal instrumentalities exception to the Tax Injunction Act as supported by the precedent underlying the Commerce Clause of the United States Constitution as it pertains to Indians?

3. Does the State of Florida provide a plain, speedy, and efficient remedy (Fla. Const. art. V, sec. 20(c)(3)) to resolve a tax case wherein an Indian or tribe is a party?

4. Is jurisdiction conferred by 28 U.S.C. 1343(3) and 42 U.S.C. 1983 in that the State of Florida Department of Revenue acting under color of

law deprived petitioner of rights, privileges and immunities secured by the Constitution and laws of the United States by wrongfully taxing her and depriving her of her property?

5. Does this Court have jurisdiction in light of the fact that the Eleventh Circuit Court of Appeals based its affirmation of the District Court ruling on numerous cases which are in conflict with other Circuit Courts of Appeal and in conflict with the United States Supreme Court rulings based upon a fundamental philosophical commitment to justice and fairness for a dependent people?

6. Was petitioner correct in bringing her action as a class action in that the class is so numerous that joinder of all members is impracticable; that there are questions of law or fact common to the class; that the claims or defenses of petitioner are typical of the claims or defenses of the class; and that the petitioner will fairly and adequately protect the interests of the class?

PARTIES TO THE PROCEEDING BELOW

Petitioner Judybill Osceola, et al enrolled member of the Seminole Indian Tribe of Florida and all others similarly situated, seeks a Writ of Certiorari to review an order of the Eleventh Circuit Court of Appeals of the United States which affirmed an order of the United States District Court for the Southern District of Florida (Hon. Jose A. Gonzalez, Jr.).

There were no other parties to these proceedings.

TABLE OF CONTENTS

	<u>PAGE</u>
Questions Presented for Review.....	i
Parties to the Proceedings Below.....	iii
Table of Authorities.....	vi
Jurisdiction and Opinions Below.....	1
Constitutional Provisions and Statutes Involved	2
Statement of the Case.....	5
Reasons for Allowance of the Writ.....	10
1. This Court has never ruled on the specific question whether the Tax Injunction Act is a bar to federal court jurisdiction to an individual enrolled member of a federally recognized Indian tribe.....	10
2. This Court has never ruled on whether an individual enrolled member of a federally recognized Indian Tribe can assert federal court jurisdiction under the principles represented by the co- plaintiff doctrine to the federal instrumentalities exception of the Tax Injunction Act and by the Commerce Clause of the United States Constitution.....	11
3. The State of Florida fails to provide a plain, speedy and efficient remedy for an Indian to resolve a state tax dispute.	14

4.	The decision of the United States District Court of the Southern District of Florida, affirmed by the Eleventh Circuit Court of Appeals conflicts with this Court's rulings that Congress has never given the State of Florida the right to tax reservation Indians and conflicts with this Court's rulings that federal jurisdiction is conferred by 28 U.S.C. 1343(3) and 42 U.S.C. 1983.....	15
5.	The Eleventh Circuit Federal Court of Appeals reliance upon the Tax Injunction Act and the Eleventh Amendment to the United States Constitution is in conflict with the Eight Circuit Court of Appeals in <u>Omaha Tribe of Indians v. Peters</u> and with the Court of Claims in <u>Dodge v. United States</u> and with this Court's rulings in <u>McClanahan v. Arizona Tax Commission</u> and <u>Moe v. Confederated Salish & Kootenai Tribes</u>	18
6.	The decision of the lower courts in this case denied as moot the significant class action issue, even though controlling federal precedent would have upheld class action certification, had federal jurisdiction been applied. Consequently, a large class has been denied due process and equal protection before the law.	21
	Conclusion.....	25
	Appendices	

TABLE OF AUTHORITIES

CASES

PAGE

FEDERAL

United States Supreme Court

<u>Alaska Pac. Fisheries v. U.S.</u> 248 U.S. 78 (1918) cited in <u>Bryan v. Itasca County</u>	9
<u>Bryan v. Itasca County</u> , 416 U.S. 373 (1976).....	8, 17
<u>McClanahan v. Arizona Tax Commission</u> , 411 U.S. 164 (1973).....	11, 19
<u>Moe V. Confederated Salish & Kootenai Tribes</u> , 425 U.S. 463 (1975).....	10, 17 19, 20
<u>U.S. v. Holliday</u> , 70 U.S. (3 Wall.) 407 (1866).....	12
<u>U.S. v. Kagama</u> , 118 U.S. 375 (1886).....	8, 12
<u>U.S. v. Mazurie</u> , 419 U.S. 544 (1975).....	12
<u>Williams v. Lee</u> , 358 U.S. 217 (1959).....	16, 19

Circuit Courts of Appeal

<u>Dodge v. U.S.</u> , 362 F2d 810 (Ct. Cl. 1966).....	7, 13, 15 19, 20
<u>Omaha Tribe of Indians v. Peters</u> , 516 F2d 133 (8th Cir. 1975).....	19, 20

Osceola v. Florida Department of Revenue,

F2d 1528 (11th Cir. 1990).....	1,8
<u>Red Eagle v. U.S.</u> ,	
300 F.2d 772 (Ct. Cl. 1962).....	7,15,20

District Courts

<u>Daney v. United States</u> ,	
247 F. Supp. 533 (Dist. Kan.)	
cited in <u>Dodge v. U.S.</u> 362 F2d 810 (1966)....	20,21

<u>Nash v. Wiseman</u> ,	
227 F. Supp. 552 (W.D. Okla. 1963)	
cited in <u>Dodge v. U.S.</u> 362 F.2d 810 (1966)...	20

<u>Osceola v. Florida Department of Revenue</u> ,	
705 F. Supp. 1552 (S.D. Fla. 1989).....	1,8

STATE

<u>Askew v. Seminole Tribe of Florida</u> ,	
474 So.2d 877 (Fla. App. 4 Dist. 1985).....	7

<u>CONSTITUTIONAL PROVISIONS</u>	<u>PAGE</u>
<u>FEDERAL</u>	

Article 1, Section 8, Clause 3.....	2,12
Amendment Five.....	2
Amendment Fourteen.....	2

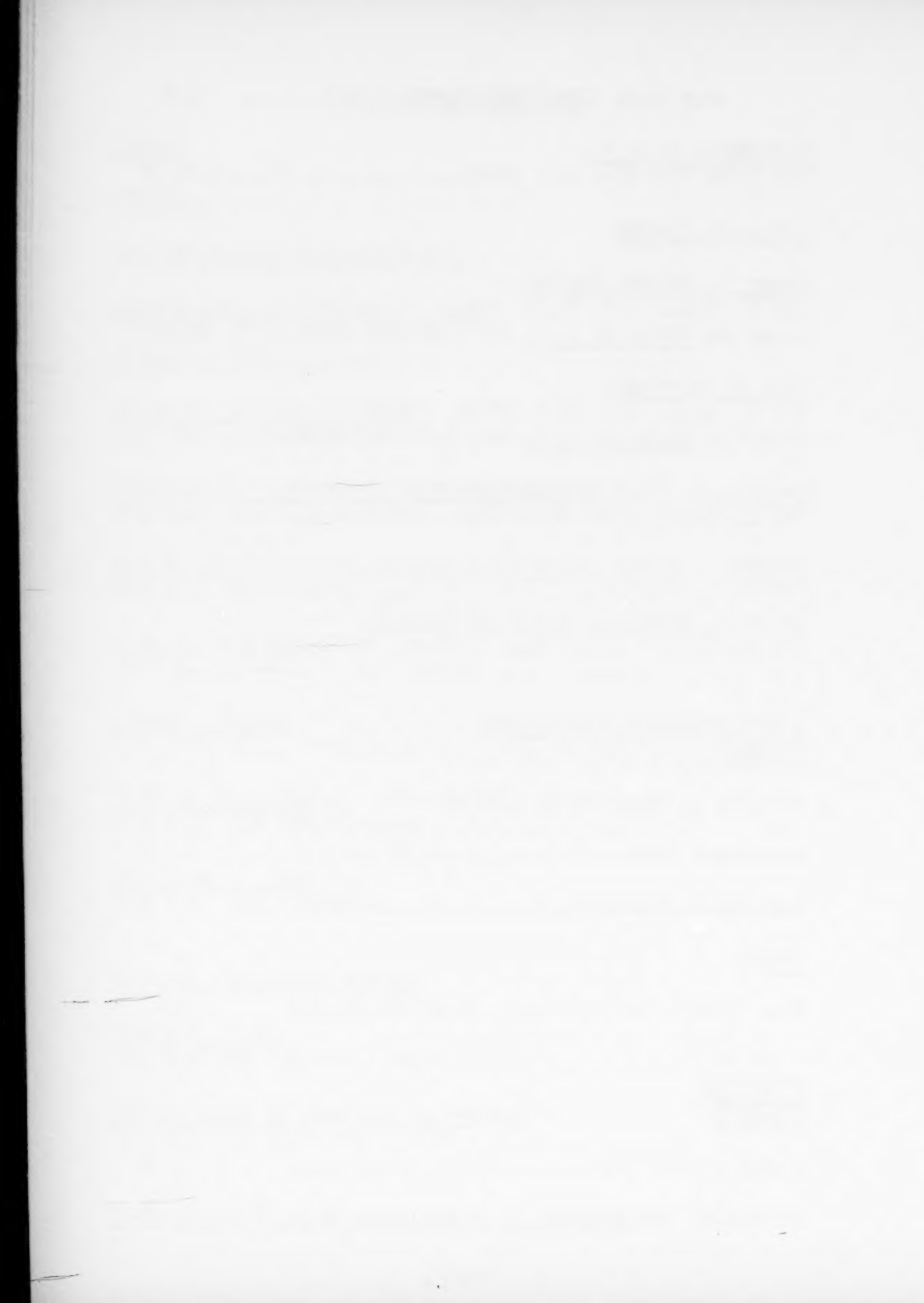
STATE

Fla. Const. art. V, sec. 20(c) (3).....	1
---	---

STATUTES

FEDERAL

4 U.S.C. 105-110.....	3
25 U.S.C. 465.....	5



25 U.S.C. 1321-1326.....	16,17
28 U.S.C. 1254 (1).....	1
28 U.S.C. 1331.....	3
28 U.S.C. 1341.....	3
28 U.S.C. 1343 (3).....	4,16,18
42 U.S.C. 1983.....	4,16,17,18
Supreme Court Rules 10.....	1
Federal Rule of Civil Procedure 23(a)...	22

STATE

Florida Statute 214.16.....	7,15
-----------------------------	------

OPINIONS

34 Ops. Att'y Gen. 302 (1924) cited in <u>Dodge v. U.S.</u> 362 F2d 810 (1966)	13
---	----

Jurisdiction and Opinions Below

The Eleventh Circuit Court of Appeals denied petitioner's Petition for Suggestion of In Banc Hearing on April 11, 1990 for a review of Osceola v. Florida Dept. of Revenue, F2d 1528 (11th Cir. 1990), which affirmed the order of the United States District Court for the Southern District of Florida, 705 F. Supp. 1552 (S.D.Fla. 1989).

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. 1254(1) and Rules of the Supreme Court, Rule 10(1) (a) and (c).

Constitutional Provisions and Statutes Involved

Constitutional Provisions

Article 1, Section 8, Clause 3

Indian relations became the exclusive province of federal law.

Amendment Five/Amendment Fourteen

No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

Statutes

4 U.S.C. 105-110 (The Buck Act)

The Buck Act, which granted permission to the states to levy and collect sales, use and income taxes in Federal areas, specifically excepted Indians residing on federally recognized Indian reservations from being taxed by the state on state sales tax and state use tax (Section 105) and on state income tax (Section 106).

28 U.S.C. 1331

The district courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1341

"(t)he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and

efficient remedy may be had in the courts of such State."

28 U.S.C. 1343(3)

"—The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

...

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

42 U.S.C. 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

STATEMENT OF THE CASE

The Seminole Indian Tribe of Florida became a federally recognized Indian tribe through the Seminole Indian Reservation Act of July 20, 1956. 25 U.S.C. 465. The Florida Department of Revenue has been illegally taxing the enrolled members of the Seminole Indian Tribe of Florida who reside on five federally recognized Seminole Indian Reservations including approximately 1314 enrolled members (approximately 472 members on the Hollywood Reservation in Broward County, Florida, 361 members on the Brighton Reservation in Glades County, Florida, 395 members on the Big Cypress Reservation in Hendry County, Florida, 49 members on the Tampa Reservation in Hillsborough County, Florida, and 37 members on the Immokalee Reservation in Collier County, Florida.)

The Florida Department of Revenue has wrongfully assessed and collected sales taxes and franchise taxes on the purchase by the enrolled members of automobiles and other vehicles, mobile

homes, goods and materials used to make home improvements, telephone service, electrical service, propane gas service and similar items that were purchased either on the reservation, or that were purchased off the reservation and delivered by merchants to the reservation, thereby becoming annexed to tribal land.

Petitioner seeks to represent the class of all enrolled members residing on the five different reservations comprising the federally recognized Seminole Indian Tribe of Florida by enjoining the Florida Department of Revenue from continuing to wrongfully assess and collect illegal sales taxes and franchise taxes, and by seeking to recover all sales taxes and franchise taxes erroneously and improperly collected.

Petitioner was required to seek federal court jurisdiction because there is no speedy, plain and efficient remedy in the State of Florida regarding resolution of a tax dispute for an Indian. The only other case regarding the State of Florida and the Seminole Indians on a taxation matter, Askew v.

Seminole Tribe of Florida, 474 So. 2d 877 (Fla. App. 4 Dist. 1985) took nine years to litigate, which length of time on its face is neither speedy nor efficient. Further, the State of Florida, pursuant to F.S. 214.16, limits the recovery of tax refunds to three years, whereas the federal courts have no limitation on recovery of wrongfully imposed taxes for an Indian. Red Eagle v. U.S., 300 F.2d 772 (Ct. Cl. 1962). Dodge v. U.S., 362 F2d 810 (Ct. Cl. 1966). The three year limitation period of the State of Florida forces petitioner into federal court to seek recovery of all taxes illegally taken without limiting her due process and equal protection rights. Otherwise, she would be limited to recovery of only three years of illegally exacted taxes were she forced to litigate in Florida state court, clearly an unequal forum.

On February 17, 1989, the United States District Court for the Southern District of Florida, without a hearing, dismissed petitioner's petition for lack of subject-matter jurisdiction and denied as moot petitioner's motion for class certification.

Osceola v. Florida Dept. of Revenue, 705 F.Supp. 1552 (S.D. Fla. 1989). The court misinterpreted certain facts and minimized or misapplied controlling federal case law and erroneously relied on Florida state law as controlling. The lower court's ruling thereby prevented petitioner from seeking to recover more than three year's of wrongfully imposed taxes by attempting to force her into state court.

On February 6, 1990, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court and held that an individual Indian could not avoid the bar of the Tax Injunction Act under the instrumentalities exception. Osceola v. Florida Department of Revenue, F2d 1528 (11 Cir. 1990). Relying on the lower court's opinion, again the court misinterpreted certain of the facts and minimized or misapplied the law, thereby departing from the strong federal policy of states not taxing Indians and denying Indians access to an impartial forum. U.S. v. Kagama, 118 U.S. 375 (1886). The court ignored controlling federal precedent reiterated in Bryan v. Itasca County, 426 U.S. 373

(1976) which stated that "...statutes passed for the benefit of dependent Indian tribes...are to be liberally construed, doubtful expressions being resolved in favor of the Indians," at 392 (quoting Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918)). The lower court's decision violated petitioner's Constitutional due process and equal protection rights by affording tribal entities greater protection and greater rights than the individual members making up the tribe. The precedent erroneously relied upon by the lower federal courts allowed only the tribe to seek federal court jurisdiction and not the enrolled members of the tribe. The lower courts ignored the crucial nexus between the tribe and its individual members who make up the tribe, and thereby denied petitioner access to the only impartial forum in which she could seek complete redress for her injuries. On April 11, 1990, the United States Court of Appeals denied petitioner's petition for Suggestion of Rehearing In Banc.

REASONS FOR ALLOWANCE OF THE WRIT

1. This Court Has Never Ruled on the Specific Question Whether the Tax Injunction Act is a Bar to Federal Court Jurisdiction to an Individual Enrolled Member of a Federally Recognized Indian Tribe.

Although this Court has considered various aspects of the question and has implied an affirmative response, it has never given a direct ruling on the question. In Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976), the Court noted probable federal court jurisdiction for individual Indians. In footnote 14, the Court stated: "Any further proceedings with respect to refund claims by or on behalf of individual Indians..., would not appear to implicate Section 1341." Id. at 475. The federal district court found jurisdiction over the tribe and individual Indian plaintiffs and stated that jurisdiction was not defeated by the Tax Injunction Act. The

District Court, affirmed by this Court, concluded that the Tax Injunction Act does not bar federal court jurisdiction for persons or entities in which the United States has a real and significant interest.

2. This Court Has Never Ruled On Whether An Individual Enrolled Member of a Federally Recognized Indian Tribe Can Assert Federal Court Jurisdiction Under the Principles Invoked by the Commerce Clause of the United States Constitution As It Applies to Indians.
-

In McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973), this Court observed: "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." *Id.* at 172 n 7 (citations omitted). The source of this federal responsibility is the Commerce Clause of the United

States Constitution which states that Congress is authorized to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. 1, sec. 8, cl. 3. This source of federal power over Indian affairs encompasses transactions with and permits federal regulation of individual Indians who are members of the tribes, as well as the tribes themselves. U.S. v. Holliday, 70 U.S. (3 Wall.) 407, 417-18 (1866). U.S. v. Mazurie, 419 U.S. 544, 554-56 (1975).

The intention of this Court has always been to place the Indian in an impartial forum that could not be subject to the inherent prejudice that could arise in a State court. Such a philosophy has been expressed in U.S. v. Kagama, 118 U.S. 375 (1886), as stated in the Court's description of Indian tribes as wards of the nation:

"Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing with the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection,

and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." Id. at 384.

This same philosophy has been expressed in Dodge v. United States, 362 F.2d 810 (Ct. Cl. 1966) which held that the statute of limitations does not apply to deny a refund claim to a noncompetent Indian, which refund claim arose as a result of an error caused by a government agent.

"The opinion of the then Attorney General Harlan F. Stone is the rock upon which plaintiff founds his case. The crucial portion of the opinion says (34 Ops. Att'y Gen. 302, 305 (1924)):

* * *In fact, so far as the actual payment is concerned, it was in many cases a matter of bookkeeping and so perfunctory that the Indians accepted it as a matter of course and as an unquestionable expenditure of their funds by their conservator and guardian acting for the paternalistic Federal Government. The superintendent acted for them because of their recognized incompetency to act for themselves. The governmentally appointed agent—I refer to the superintendent—having paid this money over, failed to discover the irregularity of his action within the five-year period provided by the income-tax statutes as the limitation period for making claims for recovery. The Indian is not to blame for this, and, if the Government could take advantage of the mistake of its own agent in this regard, it could

go just one step farther and in the interests of its revenue instruct the superintendent to allow such claims to lapse. It is needless to remark that such a practice would be repugnant to our conception of a just and fair government's policy toward this dependent people. Having appropriated the funds of its wards under a misapprehension, it should have no hesitancy in returning them. * * * " Id. at 812.

The Court further stated that the opinion reached in this case "concentrates on the necessity of dealing fairly with a group of people still placed under a disability of dependency and to which a greater obligation is owed than a narrowly legalistic view of what constitutes a technical 'duty'." Id. at 813.

3. The State of Florida Fails to Provide A
Plain, Speedy and Efficient Remedy For An
Indian To Resolve A State Tax Dispute

The Tax Injunction Act should not bar federal court jurisdiction for petitioner because there is no plain, speedy and efficient remedy for her tax

dispute within the State of Florida. The only other case regarding the State of Florida and the Seminole Indians on a taxation matter, Askew v. Seminole Tribe of Florida, 474 So. 2d 877 (Fla. App. 4 Dist. 1985) took nine years to litigate, which time period on its face is neither speedy nor efficient. Further, Florida Statute 214.16 would bar petitioner's efforts to seek a tax refund beyond a three year period, although federal court jurisdiction would allow petitioner to seek recovery of all taxes illegally taken from her without any statute of limitation. Red Eagle v. U.S., 300 F.2d 772 (Ct. Cl. 1962), and Dodge v. U.S., 362 F2d 810 (Ct. Cl. 1966) ruled that it is against U.S. policy to assert the statute of limitations against a lawful refund claim filed by or for its fullblooded, restricted, noncompetent Indian wards, and that when taxes are erroneously paid by a restricted Indian, they can be recovered without regard to any refund period.

4. The Decision of the United States District Court for the Southern District of Florida,

Affirmed by the Eleventh Circuit Court of Appeals conflicts with this Court's Rulings That Congress Has Never Given the State of Florida the Right to Tax Reservation Indians and Conflicts With This Court's Rulings That Federal Jurisdiction is Conferred by 28 U.S.C. 1343(3) And 42 U.S.C. 1983

Justice Black summed up the strong federal policy regarding Indian legislation in Williams v. Lee, 358 U.S. 217 (1959):

"Congress has acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." Id. at 218-219.

The only way in which Indians residing on Indian lands can be taxed is through an Act of Congress. Congress has never given the State of Florida the right to tax reservation Indians since the Seminole Indian Tribe became a federally recognized tribe. The only legislation that Congress has enacted that affects the Seminole Indians is Public Law 280, Aug. 15, 1953, 25 U.S.C.

1321-1326. This Court specifically exempted states from taxing Indians under Public Law 280 in Bryan v. Itasca County, 426 U.S. 373 (1976), and reiterated its commitment to justice, equity and fairness for this dependent people:

"...we must be guided by that 'eminently sound and vital canon,' that 'statutes passed for the benefit of dependent Indian tribes...are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'... Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity..."

This Court has ruled in Moe v. Confederated Salish & Kootenai Tribes, 415 U.S. 463 (1976) that the Tax Injunction Act does not bar federal court jurisdiction if there is an independent basis for federal jurisdiction. The Court, noting that the "rights, privileges, or immunities secured by the Constitution and laws" referred to in 42 U.S.C. 1983 include all of the Constitution and laws of the United States, found the alleged violation of Commerce Clause rights to be sufficient to state a

cause of action under Section 1983, and found Section 1343(3) to be the jurisdictional counterpart of Section 1983.

This Court has recognized that individual Indians of a federally recognized Indian tribe have the undeniable right to come before this Honorable Court to seek redress for taxes wrongfully imposed by a State. However, the lower federal courts have continued to ignore that 28 U.S.C. 1343 (3) and 42 U.S.C. 1983 allow petitioner the right to bring this issue in the federal courts of the United States. Petitioner would be precluded from equal protection and due process before the law were she not allowed federal court jurisdiction in that she would be precluded from recovering wrongfully imposed taxes beyond a three year period were she forced to litigate in the state court.

5. The Eleventh Circuit Court of Appeals Reliance Upon the Tax Injunction Act and the Eleventh Amendment to the United States Constitution Is In Conflict With the Eighth Circuit Court of

Appeals in Omaha Tribe of Indians v. Peters and
With the Court of Claims in Dodge v. U.S. and
With This Court's Rulings in McClanahan v.
Arizona Tax Commission and Moe v. Confederated
Salish & Kootenai Tribes

This Court has previously set forth the strong federal policy that Congressional legislation confers individual rights on individual Indians even though Congress has most often dealt with tribes as collective entities:

"To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that 'the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and to be ruled by them.' Williams v. Lee supra, at 220 (emphasis added). In this case, appellant's rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose." McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) at 181.

The lower federal courts are in further

conflict with this Court's decision in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976), in which the Court noted probable federal court jurisdiction for individual Indians in footnote 14. The lower courts are in further conflict with the Eighth Circuit Court of Appeals in Omaha Tribe of Indians v. Peters, 516 F.2d 133 (8th Cir. 1975) which held that an individual Indian could assert the co-plaintiff doctrine to the federal instrumentality exception to the Tax Injunction Act.

The Court in Dodge v. U.S., 362 F.2d 810 (Ct. Cl. 1966) found it unnecessary to determine the technical standing of the plaintiff as a prerequisite to allowing the equitable exception to the refund claim provision:

"If the equitable exception applies to this case, it applies as equally to refund claims by the Indian taxpayers themselves as to claims filed on behalf of the Indians by a government official. See Red Eagle and Nash, supra. Therefore, it is not necessary to determine whether the United States, the Superintendent (as an individual) or the Indians are the real plaintiffs here. Daney, supra, says:

"Under general tax law, this statute of limitations requirement is normally a jurisdictional prerequisite.

* * * But general rules of tax law, like general acts of Congress, do not apply to restricted Indians in such a strict manner. * * *

* * * a refund claim can be filed by a restricted Indian at any time.

* * * In other words, the non-competency of an Indian tolls the applicability of the statutes of limitations. * * *

And while tax exemptions are to be strictly construed under the "general rules," the rule is just the opposite as applied to Indians: tax exemptions are found by implication in Indian tax cases. * * *

Further, all Indian statutes are to be liberally construed: * * *

The tax cases involving restricted, noncompetent Indians are not to be analyzed as "ordinary tax cases."

* * * "[I]t is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian." [Daney collects the supporting cases.]

Id. at 815.

6. The Decision of the Lower Courts Denied As Moot the Significant Class Action Issue, Thereby Denying Due Process and Equal Protection Before the Law to a Large Class Of People

The proposed class satisfies all of the prerequisites necessary to establish a class action

as required by Rule 23(a) of the Federal Rules of Civil Procedure. The class of individual enrolled members of the federally recognized Seminole Indian Tribe does exist, and the named representative is a member of the class she purports to represent. Petitioner is an enrolled member of the Seminole Indian Tribe of Florida who resides on the Hollywood Reservation, and who has paid numerous sales taxes and franchise taxes to the Department of Revenue of the State of Florida that were erroneously and improperly assessed and collected by the State of Florida Department of Revenue. In addition, the class is so numerous (exceeding 1300 members residing on five different reservations located in five different counties in the State of Florida) that joinder of all members is impracticable. Further, there are questions of law or fact common to the class—Did the State of Florida Department of Revenue violate federal laws by assessing and collecting sales and franchise taxes from enrolled members of the Seminole Indian Tribe of Florida

residing on the reservation on their purchase of such items as automobiles and other vehicles, mobile homes, goods and materials used to make home improvements, telephone services, electrical services, propane gas services, and similar items that were purchased either on the reservation, or that were purchased off the reservation but were delivered on to the reservation, thereby becoming annexed to tribal land? Further the claims or defenses of the named representative are typical of the claims or defenses of the class in that she possesses the same interests and suffers the same injury as the class members. Finally, the named representative will fairly and adequately protect the interests of the class.

If separate actions were prosecuted by or against individual members of the class, a risk would be created of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the State of Florida Department of Revenue. Moreover, the State of

Florida Department of Revenue has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members so that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

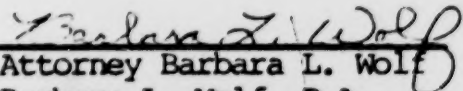
CONCLUSION

The petition for a Writ of Certiorari should be granted; in the alternative, the matter should summarily be remanded to the United States District Court of the Southern District of Florida for a full and complete review not inconsistent with this Court's prior rulings.

Dated: Fort Lauderdale, Florida

July 6, 1990

Respectfully submitted,


Attorney Barbara L. Wolf
Barbara L. Wolf, P.A.
2425 E. Commercial Blvd.
Suite 307
Ft. Lauderdale, FL 33308
(305) 492-1111



IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-5234

JUDYBILL OSCEOLA, et al enrolled
member of the Seminole Indian Tribe
of Florida and all others similarly
situated, Plaintiff-Appellant,
versus

FLORIDA DEPARTMENT OF REVENUE,
Defendant-Appellee.

Appeal from the United States District Court for

Southern District of Florida

ON PETITIONS FOR REHEARING AND SUGGESTIONS OF

REHEARING IN BANC

(Opinion February 6, 1990, 11 Cir., 198 __, __ F.2d __)

Before HATCHETT and COX, Circuit Judges, and
HENDERSON, Senior Circuit Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

() The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

() A member of the Court in active service having requested a poll on the reconsideration of this

cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

Joseph W. Hatchett

United States Circuit Judge

ORD-42

FILED

U.S. COURT OF APPEALS

ELEVENTH CIRCUIT

APR 11 1990

MIGUEL J. CORTEZ

CLERK

APPENDIX B

Judybill OSCEOLA, et al enrolled member
of the Seminole Indian Tribe of Florida
and all others similarly situated,

Plaintiff-Appellant,

v.

FLORIDA DEPARTMENT OF REVENUE

Defendant-Appellee.

No. 89-5234

United States Court of Appeals

Eleventh Circuit.

Feb. 6, 1990.

Indian brought action challenging application of
Florida sales and franchise taxes to property which
she purchased off the reservation for use on the
reservation. The United States District Court for
the Southern District of Florida, No.
88-6522-CivJAG, Jose A. Gonzalez, Jr., J., 705 F.
Supp. 1552, dismissed, and Indian appealed. The
Court of Appeals, Hatchett, Circuit Judge, held that

individual Indian could not avoid the bar of the Tax Injunction Act under the instrumentalities exception.

Affirmed.

1. FEDERAL COURTS 27

Tax Injunction Act was intended to prevent taxpayers from using federal courts to raise questions of state or federal tax law relating to the validity of particular taxes. 28 U.S.C.A. 1341.

2. FEDERAL COURTS 27

Taxpayer must follow required state procedure to challenge validity of particular state tax and is generally deprived of access to federal courts to obtain determination of federal issues. 28 U.S.C.A. 1341.

3. FEDERAL COURTS 27

Florida provides a plain, speedy, and efficient remedy for when challenging validity of application of sales tax so as to make Tax Injunction Act

applicable to action challenging application of Florida sales tax; Florida circuit courts have jurisdiction to hear challenges to any state tax and have the power to issue declaratory and injunction relief, and taxpayer has the statutory right to seek a tax refund from the state. West's F.S.A. 72.011, 215.26; West's F.S.A. Const. Art. 5, 20(c)(3); 28 U.S.C.A. 1341.

4. FEDERAL COURTS 27

Under the "instrumentalities exception" to the Tax Injunction Act, a plaintiff is not required to follow state procedures and remedies before invoking jurisdiction of the federal courts if plaintiff is an instrumentality of the United States. 28 U.S.C.A. 1341.

5. FEDERAL COURTS 27

Only an Indian tribe or governing body duly recognized by the Secretary of the Interior can assert federal court jurisdiction over claims brought by Indian tribes under the Constitution to

defeat the jurisdictional bar of the Tax Injunction Act under the instrumentalities exception to that bar; individual Indian could not avoid the bar of the Act when seeking to challenge application to her of state sales and franchise taxes. 28 U.S.C.A. 1341, 1362.

Appeal from the United States District Court for the Southern District of Florida.

Before HATCHETT and COX, Circuit Judges, and HENDERSON, Senior Circuit Judge.

HATCHETT, Circuit Judge.

In this appeal, an individual Seminole Indian, who is not a tribe representative or official, asserts that the district court erred in ruling that 28 U.S.C. 1362, which provides federal question jurisdiction for Indian tribes, does not also serve as an exception to the bar of the Tax Injunction Act (28 U.S.C. 1341). We affirm.

FACTS

Judybill Osceola brought this action as an alleged class representative of all Florida Seminole Indians ("appellants"). Osceola filed this lawsuit in her individual capacity and not as an official of a recognized tribal government. She alleged that the state of Florida unconstitutionally collected sales tax and franchise tax on the purchase of vehicles, motor homes, goods and materials, telephone services, electrical services, propane gas service, and similar items purchased off the reservation but delivered or taken to Osceola's residence on the reservation. Osceola sought declaratory relief, injunctive relief, and damages in the form of a refund of tax payments erroneously assessed by the state of Florida ("state") from 1956 to the present.

PROCEDURAL HISTORY

Osceola sought recovery under 28 U.S.C. 1331, 28 U.S.C. 1343, 42 U.S.C. 1983, and the commerce clause. The state moved to dismiss the complaint

alleging that the Tax Injunction Act (28 U.S.C. 1341) and the eleventh amendment to the United States Constitution barred such an action. The district court granted the state's motion to dismiss and denied Osceola's motion for class certification because the issue was moot. 705 F. Supp. 1552. The district court held that Osceola, an individual, could not invoke jurisdiction under the provisions of 28 U.S.C. 1341. The district court also held that Osceola did not establish jurisdiction under any of the other independent statutory grounds. Alternatively, the district court held that the eleventh amendment barred the lawsuit.

CONTENTIONS

Osceola contends that the Tax Injunction Act is not a bar to this lawsuit, and thus the district court erred when it dismissed the case for lack of jurisdiction. She also contends that the district court has subject matter jurisdiction under 28 U.S.C. 1331, 28 U.S.C. 1343(3), 42 U.S.C. 1983, the

Commerce clause of the United States, and binding case law.

The state contends that the Tax Injunction Act bars the district court from hearing a lawsuit brought by an individual Indian challenging the constitutionality of a state's sales tax.

ISSUE

The issue is whether the Tax Injunction Act bars individual Indians from bringing a lawsuit in federal court challenging the constitutionality of a state's sales tax.¹

DISCUSSION

(1,2) Section 1341 of Title 28 of the United States Code ("Tax Injunction Act" or "the Act") provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the

courts of such state." The Act does not confer jurisdiction, but instead limits jurisdiction which might otherwise exist. May v. Supreme Court of Colorado, 508 F.2d 136 (10th Cir.1974), cert. denied, 422 U.S. 1008, 95 S.Ct. 2631, 45 L.Ed.2d 671 (1975). The Tax Injunction Act was intended to prevent taxpayers from using federal courts to raise questions of state or federal law relating to the validity of particular taxes. Wells v. Malloy, 510 F.2d 74 (2d Cir.1975). After passage of the Act, a taxpayer must follow required state procedure and is generally deprived of access to federal courts to obtain determination of federal issues. Geo. F. Alger Co. v. Peck, 347 U.S. 984, 74 S.Ct. 853, 98 L.Ed.1120 (1954). While the Act on its face bars injunctive relief, it has been judicially expanded to include suits for declaratory relief. California v. Grace Brethren Church, 457 U.S. 393, 102 S. Ct. 2498, 73 L. Ed.2d 93 (1982); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 63 S. Ct. 1070, 87 L.Ed. 1407 (1943). The Act has also been applied to actions for damages, including suits for the

refund of tax assessments made by a state. Rosewell v. LaSalle Nat. Bank, 450 U.S. 503, 101 S. Ct. 1221, 67 L.Ed.2d 464 (1981); Fair Assessment in Real Estate Ass'n. Inc. v. McNairy, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981); Bland v. McHann, 463 F.2d (5th Cir. 1972), cert denied, 410 U.S. 966, 93 S. Ct. 1438, 35 L.Ed.2d 700 (1973); The Assiniboine & Sioux Tribes v. Montana, 568 F.Supp. 269 (C.Mont. 1983).

Unless this case fits within a recognized exception, the Tax Injunction Act clearly bars federal courts from maintaining jurisdiction under the circumstances present in this case.

(3) The state correctly argues that Florida provides a "plain, speedy, and efficient remedy." The Florida constitution grants to the state's circuit courts jurisdiction to hear challenges to any state tax. Fla. Const. art. V, 20(c)(3). Florida courts are also given power to issue declaratory and injunctive relief in tax cases. See

Fla. Stat. Ann. 72.011 (West Supp. 1988) and 86.011 (West 1987). Furthermore, a Florida taxpayer has the statutory right to seek a tax refund from the state. Fla. Stat. Ann. 215.26 (West 1971). The Florida Supreme Court has held that this statute (215.26) authorizes the refund of taxes paid under an unconstitutional law. State ex rel. Hardaway Contracting Co. v. Lee, 155 Fla. 724, 21 So. 2d 211 (1945). Moreover, this circuit has held that the Florida tax remedies are "plain, adequate and complete." See Winicki v. Mallard, 783 F.2d 1567, 1570 (11th Cir.) cert .denied, 479 U.S. 815, 107 S. Ct. 70, 93 L.Ed.2d 27 (1986).

(4) Recognizing the applicability of the Tax Injunction Act, Osceola's principal argument is that federal jurisdiction can be invoked under what has become known as "the instrumentality exception." Department of Employment v. United States, 385 U.S. 355, 87 S.Ct. 464, 17 L.Ed.2d 41 (1966). This exception provides that the jurisdictional barrier of 28 U.S.C. 1341 is "inapplicable to suits brought

by the United States 'to protect itself and its instrumentalities from unconstitutional state exactions.'" Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 470, 96 S.Ct. 1634, 1640, 48 L.Ed.2d 96 (1976) (citations omitted). The federal instrumentalities doctrine establishes "that 1341 does not act as a restriction upon suits by the United States to protect itself or its instrumentalities from unconstitutional state action." Dept. of Employment v. United States, 385 U.S. at 358, 87 S.Ct. at 467. Thus, under the instrumentalities exception, a plaintiff is not required to follow state procedures and remedies before invoking the jurisdiction of the federal courts.

Indian lands have long been regarded as an instrumentality of the United States; thus, the United States can enjoin state taxation of Indian lands. See Moses v. Kinnear, 490 F.2d 21 (9th Cir. 1973). The federal instrumentality doctrine has also been used to defeat the jurisdictional bar of section 1341 in cases where a party, other than the

United States, files a lawsuit challenging the constitutionality of a state's taxing scheme.

Osceola argues that the federal instrumentality exception, as modified by the co-plaintiff's doctrine applies to suits brought by individual Indians. See Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973); see also Moses, 490 F.2d 21 (9th Cir. 1973) (instrumentality doctrine applies where suit could have been brought by the United States and is in fact brought by parties who could properly be co-plaintiffs with the United States.) Osceola also argues that Confederated Salish & Kooteni Tribes v. Moe, 392 F.Supp. 1297 (D.Mont. 1975) aff'd, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976) allows her access to federal courts. Moe involved a consolidated appeal by an Indian and also by class representatives of individual tribe members. A special three-judge district court panel accepted jurisdiction based on the federal instrumentality doctrine. The district court concluded:

While the exceptions to section 1341 have been expressed most often in terms of the federal instrumentality doctrine, we do not view the exceptions as limited to cases where this doctrine is clearly applicable. It seems clear [that section 1341] does not bar federal court jurisdiction in cases where immunity from state taxation is asserted on the basis of federal law with respect to persons or entities in which the United States has a real and significant interest.

Moe, 392 F.Supp. at 1303. The Supreme Court affirmed the district court, holding that, notwithstanding the provisions of 28 U.S.C. 1341 prohibiting a federal district court from enjoining the assessment of any state tax where an adequate remedy may be had in state courts, the district court had jurisdiction under 28 U.S.C. 1362. Moe v. Confederated Salish & Kooteni Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). Relying on the district court's reasoning and the Supreme Court's affirmance, Osceola argues that 28 U.S.C. 1341 is

not a bar to suits brought by individual Indians where the United States has a real and significant interest.

Osceola's reliance on Moe is misplaced. Although the Moe Court affirmed the district court's finding of jurisdiction, it did so on grounds different from those Osceola asserts. In affirming, the Court stated that Indian tribes suing pursuant to 28 U.S.C. 1362 were not barred by the provisions of 28 U.S.C. 1341.² The Court concluded that "all substantive issues raised on appeal can be reached by deciding the claims of the tribe alone, which [brought the] action in the district court under section 1362." The Moe Court then examined the legislative history of 28 U.S.C. 1362 to determine whether Indian tribes suing under section 1362 are exempt from the provisions of 28 U.S.C. 1341.

Initially, the Court noted "that the mere fact that a jurisdictional statute such as 1362 speaks in general terms of 'all' enumerated civil actions does not itself signify that Indian tribes are exempted from the provisions of 1341." Moe 425 U.S. at 472,

96 S.Ct. 1t 1641. After determining that section 1362 does not provide a blanket exemption to 28 U.S.C. 1341, the Court examined the legislative history of section 1362 to determine if it contemplated an exemption under the circumstances before the Court. The Court concluded that Congress "intended to open the federal courts to the kind of claims that could have been brought by the United States as trustees, but for whatsoever reason were not so brought." Moe, 425 U.S. at 172, 96 S.Ct. at 1641. The Court further concluded "that Congress contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws or treaties' would be at least in some respects as broad as that of the United States suing as the tribe's trustee." Moe, 425 U.S. at 473, 96 S.Ct. at 1641 (emphasis added). The Moe Court reasoned that, "[s]ince the United States is not barred by section 1341 from seeking to enjoin the enforcement of a state tax law, [citation omitted]...the tribe is not barred from doing so here." Moe, 425 U.S. at 474-75, 96 S.Ct. at 1642.

[5] The Supreme Court's analysis leads us to conclude that only an Indian tribe or a governing body duly recognized by the Secretary of the Interior, can rely on section 1362 to defeat the jurisdictional bar of 28 U.S.C. 1341. Contrary to Osceola's assertion, nothing in Moe suggests that the Supreme Court extended the federal instrumentality exception to suits in federal courts by individual Indians. In fact, the court clearly rejected the district court's expansive interpretation of the federal instrumentality doctrine by stating that

[w]hile the concept of a federal instrumentality may well have greater usefulness in determining the applicability of section 1341, [citation omitted] than in providing the touchstone for deciding whether or not Indian tribes may be taxed, [citation omitted] we do not believe that the district court's expanded version of this doctrine, quoted above, can by itself avoid the bar of section 1341. [Emphasis added.]

Moe, 425 U.S. at 471-72, 96 S.Ct. at 1640.

In arguing that the federal instrumentality exception extends to suits brought by individual Indians, Osceola also relies on Omaha Tribe v. Peters, 516 F.2d 133 (8th Cir. 1975). In Omaha Tribe, the Eighth Circuit, relying on Moses v. Kinnear, 490 F.2d 21 (9th Cir. 1973), held that individual Indians could assert the federal jurisdictional bar to 28 U.S.C. 1341. Omaha Tribes, 516 F.2d at 136. The Moses decision, however, was later expressly rejected by the Ninth Circuit in Dillon v. Montana, 634 F.2d 463 (9th Cir. 1980). The Dillon court, relying on Moe, held that the federal instrumentality exception extends only to suits brought by Indian tribes Dillon, 634 F.2d at 469. See also Navajo Tribal Utility Authority v. Arizona Dept. of Revenue, 608 F.2d 1228, 1233-34 (9th Cir. 1979) (individual tribe members could not be treated as an Indian tribe or band for the purposes of 28 U.S.C. 1362 and could not reap the benefit of the co-plaintiff rule to avoid the jurisdictional bar of 28 U.S.C. 1341).

Additionally, the Dillon court rejected the argument that individual Indians are exempt from the provisions of 28 U.S.C. 1341 based on 28 U.S.C. 1362.

CONCLUSION

We conclude that the state has a plain, speedy and efficient remedy for any alleged constitutional violation of its sales tax provisions. Thus, the Tax Injunction Act bars Osceola from challenging the state's sales tax. The district court is affirmed.

AFFIRMED.

Footnotes:

¹ Because we conclude that the Tax Injunction Act bars this lawsuit, we need not address the other issues raised on appeal.

² Title 28 U.S.C. 1362 states: The district courts shall have original jurisdiction of all civil

actions, brought by an Indian Tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States.

APPENDIX C

705 F. Supp. 1552 (S.D.Fla. 1989)

Judybill OSCEOLA, Enrolled Member of
the Seminole Indian Tribe of Florida,
et al., all others similarly situated,
Plaintiffs,

v.

FLORIDA DEPARTMENT OF REVENUE,
Defendants.

No. 88-6522-CIV-JAG

United States District Court,

S.D. Florida,

Fort Lauderdale Division.

Feb. 17, 1989.

Alleged class representative of Indians in Florida
brought action in individual capacity challenging
Florida's imposition of sales and franchise taxes on
property and services purchased off the reservation

but delivered or taken to her residence on the reservation. The State Department of Revenue moved to dismiss complaint. The United States District Court, Gonzalez, J., held that: (1) Buck Act did not provide federal court jurisdiction under instrumentality exception to Tax Injunction Act; (2) state taxes were not preempted by congressional legislation; and (3) Eleventh Amendment barred action.

Motion granted.

1. TAXATION 181

Buck Act did not immunize Indians from state taxation, as would have allowed federal court jurisdiction to hear challenge to Florida tax by individual allegedly representing Indians in Florida under federal instrumentality exception to Tax Injunction Act. 28 U.S.C.A. 1341; 4 U.S.C.A. 109.

2. FEDERAL COURTS 195

Statute which ceded civil and criminal jurisdiction over Indian lands to states did not

provide federal court with jurisdiction to hear action by alleged representative of Indians in Florida challenging state taxation. Civil Rights Act of 1968, 402(a), 25 U.S.C.A. 1322(a); 28 U.S.C.A. 1341.

3. INDIANS 27(2)

Statute which granted district court jurisdiction to hear actions brought by Indian tribe or band with governing body duly recognized by Secretary of Interior did not grant jurisdiction to hear challenge to Florida tax brought by alleged class representative of Indians in Florida in her individual capacity. 28 U.S.C.A. 1362.

4. CIVIL RIGHTS 13.9

Federal court did not have jurisdiction to hear Sec. 1983 claim advanced by alleged representative of Indians in Florida challenging state taxation absent showing that Florida's statutory scheme for tax returns was not plain, speedy and efficient remedy. 28 U.S.C.A. 1343(3); 42 U.S.C.A. 1983.

5. STATES 18.75

TAXATION 1209

State sales and franchise taxes on property and services purchased off Indian reservation but delivered or taken to residence on reservation were not preempted by congressional legislation.

6. FEDERAL COURTS 265

Eleventh Amendment barred Indian's action challenging Florida tax. U.S.C.A. Const. Amend.11.

Barbara Wolf, Fort Lauderdale, Fla., for plaintiffs.

Joseph C. Mellichamp, III, Eric Taylor, Asst. Attys. Gen., Dept. of Legal Affairs, Tallahassee, Fla., for defendants.

ORDER

GONZALEZ, District Judge.

THIS CAUSE has come before the court upon the various motions in this cause. The defendants have

moved to dismiss the complaint pursuant to Federal Rule 12(b)(1) and (6). The plaintiff has filed a response to the motion to dismiss which the court has received and considered.

The plaintiff has brought this action as an alleged class representative of all Florida's Seminole Indians. The suit was filed by the plaintiff in her individual capacity and not as an official representative of a recognized tribal government.

As stated by the plaintiff, this action was brought because of the "collection of sales taxes and franchise taxes from Petitioners by Respondent on Petitioner's purchase of automobiles and other vehicles, mobile homes, goods and materials used to make improvements to their homes, telephone services, electrical service, propane gas service, and similar items that were purchased off the reservation but which were delivered or taken to Petitioner's residence on the reservation." See Memorandum in Support of Petitioner's Response to Respondent's Motion to Dismiss at 2. The complaint

prays for declaratory relief, injunctive relief against the defendant from future collection of these taxes, and damages in the form of a refund of tax payments erroneously assessed by the state between the years 1956 to the present day.

Defendants move to dismiss the complaint alleging that the Tax Injunction Act, 28 U.S.C. 1341, and the Eleventh Amendment bar this action.

Section 1341 of Title 28 of the United States Code provides:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Tax Injunction Act manifests the maxim that a court should not act, in equity, when there is an adequate remedy at law. The statute also reflects the federal interest in comity between the national and state sovereigns. Because states rely upon taxation to carry on their governments, the federal sovereign, through its judiciary, is reluctant to

interfere in this basic state function. See Tully v. Griffin, 429 U.S. 68, 73, 97 S.Ct. 219, 222, 50 L.Ed.2d 227 (1976); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 297-99, 63 S.Ct. 1070, 1072-74, 87 L.Ed. 1407 (1943).

On its face, the Act bars injunctive relief. It has been judicially expanded to include suits for declaratory relief, California v. Grace Brethren Church, 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943). Moreover, the Act has been applied to actions for damages, Rosewell v. LaSalle National Bank, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981), reh'g denied, 451 U.S. 1011, 101 S.Ct. 2349, 68 L.Ed.2d 864 (1981); Fair Assessment in Real Estate v. McNary, 454 U.S. 100, 102 S.Ct. 177, 70 L.Ed.2d 271 (1981), including suits for the refund of tax assessments made by a state, Bland v. McHann, 463 F.2d 21 (5th Cir.1972); The Assiniboine & Sioux Tribes v. Montana, 568 F.Supp. 269 (D.Mont. 1983).

The defendants allege that the Tax Injunction Act applies here because Florida provides a "plain, speedy and efficient remedy". The Florida Constitution grants the state's Circuit Courts with jurisdiction to hear challenges to any state tax. Fla. Const. art. V, 20(c)(3). Florida courts are also given power to issue declaratory and injunctive relief in tax cases. See FLA.STAT.ANN 72.011 (West Supp.1988) and 86.011 (West 1987).

A Florida taxpayer also has the statutory right to seek a tax refund from the state. FLA.STAT.ANN 215.26 (West 1971). The Florida Supreme Court has held that this statute authorizes the refund of taxes paid under an unconstitutional law. State ex rel. Hardaway Contracting Co. v. Lee, 155 Fla. 724, 21 So.2d 211 (1945) (refund authorized under subsection (1)(c) as a tax paid "in error"); cf. Acquarius Condominium Assoc. v. Markham, 442 So.2d 423 (Fla.App. 4th DCA 1983) (questioning whether a taxpayer can ever be denied his day in court to challenge a tax law).

The plaintiff does not allege that the state remedies are inadequate. Even if the plaintiff did take such a position, it would likely lack merit. See Winicki v. Mallard, 783 F.2d 1567, 1570 (11th Cir. 1986) (noting district court's ruling that Florida tax remedies were "plain, adequate and complete"); cf Rosewell v. LaSalle National Bank, 450 U.S. 503, 101 S.Ct. 1221, 67 L.Ed.2d 464 (1981) (state refund procedure adequate under Sec. 1341 despite two-year delay in receiving refund and failure of state to pay interest on the refund), reh'g denied, 451 U.S. 1011, 101 S.Ct. 2349, 68 L.Ed.2d 864 (1981).

[1] Rather than attack the adequacy of the state remedies, the plaintiff contends that this court has jurisdiction under the instrumentality exception to the Tax Injunction Act. This doctrine states that the Sec. 1341 jurisdictional bar does not apply to actions brought by the United States or one of its instrumentalities. The issue, then, is whether a class action by individual, enrolled members of an

Indian tribe constitutes a federal instrumentality for purposes of immunity from state taxation.

The plaintiff's contention that this is a suit by a U.S. instrumentality is apparently based upon the historical trustee relationship existing between the federal government and the various Indian tribes. The test today of what or who constitutes an instrumentality is a question of Congressional intent. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2 114 (1973). Here, the test is whether Congress has designated the members of the Seminole Indian tribe as federal instrumentalities.

The plaintiff relies upon Title 4 of the United States code, sections 105 through 110 (known as the "Buck Act") as evidence that Congress exempted the Seminole Indians from all state taxation. Specifically, the plaintiff points to section 109 which provides: "Nothing in sections 105 [state sales and use tax] and 106 [state income tax] of this title shall be deemed to authorize the levy or

collection of any tax on or from any Indian not otherwise taxed."

Plaintiff's reliance on the Buck Act is misplaced. The legislation was passed in 1947 simply to allow states to tax federal employees living in their state, but working on federal lands. In effect, the federal government ceded some degree of sovereignty over federal areas to the states. See Rountree v. City and County of Denver, 197 Colo. 497, 596 P.2d 739 (1979). Contrary to plaintiff's view, section 109 is not an affirmative grant of immunity. Rather, this section of the Buck Act merely reaffirms that the federal government did not intend, through the passage of legislation, to grant any more jurisdiction to the states over the Indian tribes other than that which they already possessed.

Moreover, the Buck Act surely did not have the broad scope argued for by the plaintiff. In construing the tax immune status of Indians, the Supreme Court has stated a rule of construction fatal to plaintiff's argument. In Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36

L.Ed.2d 114 (1973), the Court held that the state of New Mexico could impose a gross receipts tax on a ski resort operated by an Indian tribe on nonreservation land leased from the federal government. In ruling that the tribe was not a federal instrumentality, the Court stated that the rule that tax exemptions are not granted by implication applied to state taxation of Indians as well as all others. 411 U.S. at 156-57, 93 S.Ct. at 1274-75. Here, section 109 of the Buck Act is certainly not the type of specific statement that Congress would have passed to immunize Indians from state taxation.

[2-4] Alternately, the plaintiff relies on other federal statutes to give this court jurisdiction. However, none of these apply either to provide an independent jurisdictional base or to override the Tax Injunction Act. Section 1322(a) of Title 25, United States Code, which cedes civil and criminal jurisdiction over Indian lands to the states is irrelevant and actually supports the defendant's position. Section 1362 of Title 28 is inapplicable

because the statute only applies to actions brought by an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior". Finally, plaintiff's reliance upon 42 U.S.C. 1983 and 28 U.S.C. 1343(a) (3) (granting jurisdiction over Sec. 1983 actions to federal districts courts) is equally meritless. The law is clear that section 1983 claims advanced by the plaintiff cannot be heard unless there is a showing that Florida's statutory scheme for tax refunds is not a plain, speedy and efficient remedy. Winicki v. Mallard, 783 F.2d 1567, 1570 (11th Cir.1986).

Historically, Indians have only been exempted from state taxation of reservation property or on income derived from reservation activities. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973). As the Supreme Court stated, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to

all citizens of the State." Mescalero, 411 U.S. at 148-49, 93 S.Ct. at 1270-71.

Plaintiff cites Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), as support. However, this case is in line with the above-mentioned authorities which hold that the state has a limited right to tax reservation Indians. In Moe, the Court held that the state of Montana could not impose (1) a personal property tax on property located on the reservation, (2) a vendor tax on the tribe's cigarette business conducted on reservation lands, or (3) a sales tax on cigarettes for on-reservation sales between Indians. Cf. Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976) (state personal property tax on Indian's mobile home located on lands held in trust for the tribe invalid); McClanahan v. State Tax Comm. of Arizona, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (state income tax unlawful as to Indian income derived solely from on-reservation sources).

[5] Therefore, it is clear that the Florida taxes here are not preempted by any Congressional legislation. The only other possible limitation applicable is that a state cannot tax Indians in such a way as to unduly interfere with the tribal right of self-government. However, this limitation is also irrelevant. There is no evidence of any impermissible state interference and no showing that further discovery is necessary. It is also noteworthy that the Seminole tribe itself did not bring this action or move to intervene as a party. Simply put, there is little chance of state interference with an Indian nation's sovereignty when one of its members ventures into another sovereignty, purchases goods and services there, and is required to pay a tax on those purchases.

[6] The defendant's motion to dismiss is also justified on the alternate ground that the Eleventh Amendment bars this action.

Under the theory that an Indian tribe constitutes a "foreign nation", courts have held that the Amendment is applicable to Indians. See Standing

Rock Sioux Indian Tribe v. Dorgan, 505 F.2d 1135
(8th Cir. 1974).

The defendant is correct in asserting the Eleventh Amendment bar.

There are no applicable exceptions. The plaintiff has failed to point to any Congressional enactments under the Fourteenth Amendment which abrogate Florida's sovereign immunity. Even if plaintiff were to rely upon the statutes cited above against the application of the Tax Injunction Act, they do not provide a clear state of Congressional waiver. See Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976); Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (Congress did not abrogate Eleventh Amendment immunity by passage of 42 U.S.C. 1983). Moreover, the state of Florida has not consented to plaintiff's action. Section 215.26(4) of the Florida Statutes provides that a refund action under that section is the "exclusive procedure and remedy for refund claims between individual funds and accounts in the State Treasury".

The plaintiff's only argument is that the Eleventh Amendment does not prevent a federal court from enjoining a state official from violating federal rights. While the plaintiff is correct about this power of the federal courts as recognized in Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), it is not applicable here. As discussed above, the plaintiff has failed to establish the prerequisite to injunctive relief; namely, violation of federal rights by the state of Florida.

The court having considered the motion to dismiss, and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED as follows:

(1) The defendant's motion to dismiss is GRANTED and this cause is hereby DISMISSED. This court lacks subject matter jurisdiction over this case pursuant to the Tax Injunction Act and the Eleventh Amendment. The court does not reach the other arguments advanced by the defendants in support of their motion except to the extent discussed in the opinion.

(2) The plaintiff's motion for class certification is hereby DENIED as moot.

(3) The defendant's motion for a stay is hereby DENIED as moot and on the merits. The interests of public officials protected by the Supreme Court in Mitchell v. Forsyth, 469 U.S. 929, 105 S.Ct. 322, 83 L.Ed.2d 259 (1984) are in conflict with the policies underlying class actions as enunciated in the case of Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). Further, the defendant did not either move for a protective order or otherwise allege that the plaintiff was engaging in broad, burdensome discovery.

DONE AND ORDERED.

